Supreme Court, U.S.
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No. 09-300

In The
Supreme Court of the United States

ROBIN L. AVERY,

Petitioner,

v.

FIRST RESOLUTION MANAGEMENT CORPORATION, a foreign corporation; FIRST RESOLUTION INVESTMENT CORPORATION, an unregistered entity; DERRICK E. McGAVIC, Attorney; KRISTIN K. FINNEY, Attorney,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

DAVID A. JACOBS
Counsel of Record
LUVAAS COBB
777 HIGH STREET, SUITE 300
EUGENE, OR 97401
(541) 484-9292

Counsel for Respondents Derrick E. McGavic and Kristin K. Finney

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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The Petition Should Be Denied

Petitioner's effort to convince this Court to accept review of this case should be rejected. The issues that were before the District Court on summary judgment, and the Ninth Circuit on appeal, were simple and correctly decided. Petitioner cannot demonstrate any compelling reason that this Court should grant her petition for a *writ of certiorari*. *See* SUP. CT. R. 10.

The Ninth Circuit decided the case below by applying the Uniform Conflict of Laws-Limitations Act which was adopted by Oregon's legislature in 1987 ("UCLLA"). The ruling was narrowly drawn to address the Petitioner's arguments as to the proper interpretation and application of the UCLLA to the facts of this case. No questions of federal law are implicated, and there is no conflict with any decisions from any other United States court of appeals. In fact, Respondents are not aware of any other reported decision in state or federal court which has addressed the application of the UCLLA to similar facts. Finally, despite Petitioner's assertion that the Ninth Circuit's decision will have dire consequences for consumers, the decision is not controlling on state courts which decide the collection lawsuits directly impacting consumers[1], and in any event, the decision would potentially impact only a small subset of consumers.

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[1] This case involved a consumer's claim against a debt collector for alleged violations of the FDCPA

I. The Case Was Correctly Decided by the Ninth Circuit.

The dispositive issue below was whether the underlying collection action was timely filed by the Attorney Defendants. The action was brought in an Oregon state court on a contract which provided that New Hampshire law would govern. Oregon is one of seven states which have adopted the Uniform Conflict of Laws-Limitations Act.[2] The UCLLA provides that where another state's law governs a claim, then that state's statute of limitations applies. OR. REV. STAT. § 12.430. It further provides that if another state's statute of limitations applies, then that state's tolling statutes apply when computing the limitation period. OR. REV. STAT. § 12.440. Finally, the UCLLA provides an "escape clause" in the event a court were to determine that the resulting limitation period was substantially different from Oregon's limitation period such that it would impose an unfair burden in defending against the claim. If that were the case, Oregon's statute of limitations would apply. OR. REV. STAT. § 12.450. The wording of the UCLLA is clear and straightforward. *See* Petition for *Writ of Certiori*, pp. 4-5 (setting out OR. REV. STAT. §§ 12.430, 12.440 and 12.450).

In this case New Hampshire law provided a three year statute of limitations, but tolled the statute for any period that a defendant was absent from New Hampshire. N.H. REV. STAT. §§ 508:4, 508:9. New Hampshire courts have interpreted this tolling statute

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[2] Colorado, Minnesota, Montana, Nebraska, North Dakota and Washington are the others.

to only apply where a defendant is not subject to personal jurisdiction in New Hampshire. *See e.g. Bolduc v. Richards,* 101 N.H. 303, 142 A.2d 156, 158 (N.H. 1958). It is undisputed that Petitioner was never in New Hampshire, and it is undisputed that Petitioner was never subject to personal jurisdiction in New Hampshire. Thus, applying the UCLLA, New Hampshire's statute of limitations had not expired by the time the underlying lawsuit was filed by the Attorney Defendants in Oregon some four years after the cause of action had accrued. To the extent New Hampshire's resulting limitations period might be deemed unfair to Petitioner, the "escape clause" would allow for the application of Oregon's six-year statute – which had not yet run. Either way, as found by the Ninth Circuit, the underlying lawsuit was timely filed.

Faced with this result mandated by the UCLLA, Petitioner argued below that New Hampshire's three-year limitations period should apply, but that New Hampshire's tolling statute should be applied only if Petitioner were absent from *Oregon*. Meaning that since Petitioner was not absent from Oregon, New Hampshire's three-year statute had run by the time the lawsuit was filed. But no reading of the UCLLA could sustain such a result. As the Ninth Circuit's opinion wisely noted:

> Avery's suggested gloss of New Hampshire's tolling statute in light of Oregon's conflict law regime is wholly unwarranted; it seeks to take advantage of the portions of New Hampshire law that are favorable to Avery and ignore the balance.

Avery v. First Resolution Management Corp, et al., 568 F.3d 1018, 1023 (9th Cir. 2009).

The Ninth Circuit's opinion correctly applied the UCLLA and rejected Petitioner's argument. The opinion was narrowly drawn to only address the application of the UCLLA to these particular circumstances. As stated in the opinion:

> Although the analysis in this case is otherwise simple enough to address in an unpublished opinion, we address this issue to hold that, under OR. REV. STAT. §§ 12.430 and 12.440, when parties lawfully adopt a state's law for the purpose of resolving disputes arising from an agreement, they adopt that state's statute of limitations provision and tolling provision *in toto*. Avery agreed to abide by New Hampshire's statute of limitations as well as its tolling provisions, which have consistently been interpreted by New Hampshire courts to apply when defendants are absent from New Hampshire, not from any other state. [Footnote omitted.]

Avery, 568 F.3d at 1022.

II. The Decision Below is Not in Conflict With Any Other Courts.

Petitioner attempts to demonstrate that the Ninth Circuit's decision is in conflict with this Court, other United States courts of appeals, state courts, and even the Ninth Circuit itself. Petitioner chiefly relies on a line of cases following this Court's decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S.

888, 108 S. Ct. 2218 (1988), which found Ohio's tolling statute in violation of the Commerce Clause because claims against out of state corporations would be tolled indefinitely unless they appointed agents for service of process, thus subjecting them to general jurisdiction in Ohio for all purposes. A key to that case was that the statute of limitations was tolled even though the corporate defendant was at all times subject to Ohio's long-arm statute. *Id.* at 894. Indeed, all but one of the cases which Petitioner relies upon where courts have refused to apply a tolling statute against an out of state defendant, involved a tolling statute that would toll the limitations period even when the defendant was at all times subject to the state's long-arm statute. *See e.g. Abramson v. Brownstein,* 897 F.2d 389 (9th Cir. 1990); *Juzwin v. Asbestos Corp. Ltd.*, 900 F.2d 686 (3rd Cir. 1990); *Rademeyer v. Farris*, 284 F.3d 833 (8th Cir. 2002); *but see McCorriston v. L.W.T., Inc.*, 536 F.Supp.2d 1268 (M.D. Fla. 2008) (discussed below at Section III).

Those cases have no bearing here. The tolling statute at issue below, in accordance with the UCLLA, is New Hampshire's tolling statute, N.H. REV. STAT. § 508:9, which has been interpreted by New Hampshire courts to only apply where a defendant is not subject to personal jurisdiction in New Hampshire. *See e.g. Bolduc, supra,* 142 A.2d at 158. Petitioner, however, despite her arguments which suggest otherwise, was never subject to personal jurisdiction in New Hampshire, by long-arm statute or otherwise. Petitioner admitted this below in her briefing and at oral argument before the Ninth Circuit. *See Avery v. First Resolution Corporation, et al.*, 2007 WL1560653, *4 (D.Or. 2007) (*See* Appendix D to Petition, p. 35a) ("Plaintiff points to no basis through which process

could have been served on her in New Hampshire."). Therefore, Petitioner cannot show that the New Hampshire tolling statute is unconstitutional under any accepted principles.

III. The Ninth Circuit's Decision is Not of Exceptional Importance to Consumers.

Petitioner argues that if the Ninth Circuit's decision stands, untold numbers of consumers would be subject to stale collection lawsuits without limitation. Petitioner cites one district court case with similar facts which touched on this concern when it addressed the issue of whether the tolling statute from the chosen state's law (Delaware) should apply to a collection case brought against a defendant in Florida. *See McCorriston, supra,* 536 F.Supp.2d at 1275-77. In that case the trial court refused to apply the tolling statute because it would "effectively result in the abolition of the defense of statutes of limitation in actions involving non-residents, an absurd result." *Id.* at 1276 (internal quotations omitted).

But *McCorriston* is easily distinguished, because Florida, unlike Oregon, has not adopted the Uniform Conflict of Laws-Limitations Act. The UCLLA, in these circumstances, expressly directs the Oregon trial court to apply the statute of limitation and the tolling statute from the chosen state.[3] That was Oregon's legislative choice. But, if an Oregon court, like

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[3] See Uniform Conflict of Laws Limitations Act, § 3 [OR. REV. STAT. § 12.440] Comment ("This section treats all tolling and accrual provisions as substantive parts of the limitations law of any state whose law may be held applicable. They are part of that state's laws as that state would apply it.")(emphasis added).

McCorriston, were to find that this would effectively abolish the statute of limitations for consumers, the "escape clause" would allow the court to apply Oregon's statute of limitations. OR. REV. STAT. § 12.450. Thus, the UCLLA ensures that a defendant would not remain subject to collection suits indefinitely. That option was not available in *McCorriston*.

Moreover, the Ninth Circuit expressly limited the scope of its decision:

> We do not purport to construe definitively the scope of New Hampshire's tolling provision or to determine conclusively its effect when lawsuits are filed outside New Hampshire courts. Rather, we address only the narrow statutory argument Avery made: that under Oregon's choice of law regime, "the state" referred to in N.H. REV. STAT. ANN. § 508:9 is Oregon when a lawsuit is filed in Oregon but New Hampshire law otherwise governs.
>
> We express no opinion on arguments Avery did not raise . . . .

Avery, supra, 568 F.3d at 1022, fn. 1. Therefore, the Ninth Circuit will remain open to new and different arguments that might be made to challenge the interpretation and application of the UCLLA.

Finally, the Ninth Circuit's decision could only possibly impact consumers in those seven states which have adopted the UCLLA. But even the narrow issue decided by the Ninth Circuit is not controlling precedent on a state court when deciding whether or

not a collection lawsuit is barred by a statute of limitations.[4] In those states that have adopted the UCLLA state courts remain free to decide how it should be interpreted and applied.

But even if a state court were to consider the Ninth Circuit's decision as some authority, it would only be relevant for those consumers whose credit agreement is governed by the law of another state whose statute of limitations is shorter than the forum state's; and then only in those cases where the cause of action happened to accrue beyond the other state's statute of limitations, but before the forum state's statute. Presumably we are talking about a small subset of consumers who might be effected in any way by the Ninth Circuit's decision. Yet even those consumers could still challenge the application of another state's tolling statute on some basis besides Petitioner's theory as rejected by the Ninth Circuit.

IV. FDCPA Liability for Attempting to Collect Time-barred Debts, and the *Bona Fide* Error Defense Were Not Decided by the Ninth Circuit's Decision.

Petitioner asks this court to accept review in order to clarify the law with respect to issues involved in the lawsuit below, but which were not decided by the

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[4] It is important to keep in mind that the case at issue here is a consumer's lawsuit against a debt collector under the FDCPA. The underlying collection lawsuit, as with virtually all consumer collection cases, was brought in state court. That lawsuit was voluntarily dismissed because the Attorney Defendants determined it was not worth engaging in protracted litigation over the small amount in dispute.

Ninth Circuit. *See* Petition, pp. 27-29. The complaint below alleged that the Attorney Defendants had violated the FDCPA for attempting to collect on a time-barred debt. The Attorney Defendants denied they had violated the FDCPA, but alleged that any violation would be barred by the *bona fide* error defense. But because the Ninth Circuit found that the statute of limitations had not run on the underlying claim, it did not decide whether the FDCPA prohibits efforts to collect a time-barred debt, and thus, there was no need to consider any affirmative defenses. *See Avery, supra,* 568 F.3d at 1023, fn. 2. There is no reason that this Court should review issues which were not decided below.

Conclusion

The Ninth Circuit's decision is one of first impression. Respondents have found no other case which has addressed the application of a tolling statute pursuant to the Uniform Conflict of Laws-Limitations Act. The Ninth Circuit was careful to limit its published decision to the facts and arguments before it. If Petitioner is correct that this issue is one of importance to many consumers, then we can expect that the Ninth Circuit, along with other United States courts of appeals, will have the opportunity to fully consider and decide the issues involved with tolling in the context of the UCLLA. There may come a day when it would be appropriate for this Court to review these issues in order to resolve conflicts among the circuits or to finally decide the proper application of the UCLLA. But that day has not yet come.

Respondents request that the petition be denied.

Respectfully submitted,

DAVID A. JACOBS
Counsel of Record

LUVAAS COBB
777 High Street, Suite 300
Eugene, OR 97401
Phone: (541) 484-9292

Counsel for Respondents
Derrick E. McGavic
and Kristin K. Finney